

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

IN THE MATTER OF:	:	MEMORANDUM OPINION
J.W.,	:	
ALLEGED DELINQUENT CHILD	:	CASE NO. 2009-G-2939
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	:	
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	:	

Criminal Appeal from the Court of Common Pleas, Juvenile Division, Case No. 09 JD 000370.

Judgment: Appeal dismissed.

David P. Joyce, Geauga County Prosecutor, and *Nicholas A. Burling*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee, State of Ohio).

R. Robert Umholtz, Geauga County Public Defender, and *Dawn M. Gargiulo*, Assistant Public Defender, 211 Main Street, Chardon, OH 44024 (For Defendant-Appellant, J.W.).

CYNTHIA WESTCOTT RICE, J.

{¶1} On December 11, 2009, appellant, J.W., by and through counsel, filed a notice of appeal from a November 12, 2009 entry issued by the Geauga County Court of Common Pleas, Juvenile Division. In that entry, the trial court found that appellant was competent to stand trial.

{¶2} On December 24, 2009, appellee, the state of Ohio, filed a motion to dismiss the appeal for lack of a final appealable order. Appellant filed a response in opposition to the motion to dismiss on January 13, 2010.

{¶3} In its motion, appellee argues that an order finding a defendant competent to stand trial is not a final order subject to immediate review by this court. In support, appellee cites *State v. Hunt* (1976) 47 Ohio St.2d 170; *State v. Scott* (1984), 20 Ohio App.3d 215; and *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253. Appellee asserts that in *Upshaw*, the Supreme Court of Ohio held that a competency finding is a provisional remedy that should be reviewed under R.C. 2505.02(B)(4) to determine whether it is a final appealable order.

{¶4} R.C. 2505.02(B)(4) states:

{¶5} “An order is a final order that may be reviewed, affirmed, modified, or reversed, *** when it is one of the following:

{¶6} “(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶7} “(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶8} “(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.”

{¶9} In applying the foregoing statute, appellee concedes that the appealed order in this case is a provisional remedy. Appellee asserts that the court's finding that appellant is competent to stand trial determines the action and prevents a judgment in appellant's favor as to the provisional remedy as required by R.C. 2505.02(B)(4)(a). However, appellee asserts that the order fails the provisional remedy requirement in R.C. 2505.02(B)(4)(b) that appellant would not be afforded a meaningful or effective remedy by filing an appeal after the final judgment of the case. Appellee posits that appellant's rights would not be harmed and he would not be prevented from obtaining an effective remedy by way of appeal after the adjudicatory hearing and final disposition.

{¶10} In opposing the motion to dismiss, appellant relies upon *State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93, and *Upshaw*, supra, to support the proposition that the trial court's finding of competency is a final order even though the underlying criminal case has not been entirely resolved. Appellant indicates that "[a]lthough the *Muncie* and *Upshaw* cases deal with orders subsequent to a finding of incompetency *** the analysis is applicable to the competency proceeding in the case at bar." Appellant argues that the order denied relief in a provisional remedy proceeding, and the order determined the action with respect to the provisional remedy and prevented a judgment in his favor regarding the provisional remedy. Appellant disagrees with appellee's assertion that appellant would be afforded a meaningful remedy after the case is concluded "because he now must attend all proceedings without the benefit of full comprehension and without being able to effectively communicate with his attorney."

Therefore, appellant concludes that the order is a provisional remedy that meets the three-prong test for being a final appealable order.

{¶11} One of the major distinctions between *Upshaw* and the present case is that the former had to do with a finding of incompetency by the court and its subsequent order committing the defendant to a treatment facility. In *Upshaw*, the Supreme Court of Ohio found that all three prongs of the R.C. 2505.02(B)(4) had been met: 1) the finding of incompetency was a provisional remedy; 2) the order determined the action and prevented a judgment; and 3) a meaningful or effective remedy would not be afforded at the conclusion of the entire case. In reaching the determination in the third prong, the court reasoned that, without an immediate appeal of the finding of incompetency, the mistake could not be corrected later. *Id* at 193. If or when the defendant is found to be competent to stand trial and is convicted, the commitment order could be reviewed as part of that appeal, but any relief for such error would be moot. If defendant is acquitted, “the lack of remedy is even clearer.” *Id* at ¶18.

{¶12} Further, in holding that a competency finding is not a final appealable order, the court in *Scott*, *supra*, at 217, stated:

{¶13} “*** any error in a determination that a defendant is competent to stand trial can be remedied by reversal and subsequent retrial with due process of the law.” *Id*.

{¶14} Thus, it is clear that the final appealable order decision in the present case must rest upon whether there would be an effective remedy by appeal following adjudication of the entire case. The potential loss of a meaningful or effective remedy associated with an incompetency finding as in *Upshaw* would simply not exist in cases

where there is a competency finding. An incompetency finding would be followed by a commitment until a competency finding is made in order for the trial to proceed. The time spent in a treatment facility waiting to be found competent to stand trial cannot be recouped. In contrast, when a party is declared competent to stand trial, the trial proceeds to final disposition, and an appeal may follow.

{¶15} Pursuant to the foregoing analysis, we find that a competency finding is a provisional remedy. However, such finding does not meet the second prong of R.C. 2505.02(B)(4) since appellant will have a meaningful and effective remedy by way of appeal after the case is completely resolved in the trial court. Therefore, we conclude that the order finding appellant competent to stand trial is not a final appealable order.

{¶16} Appellee's motion to dismiss is granted, and the appeal is dismissed for lack of jurisdiction.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur